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| <p><b>This Opinion is Not a<br/>Precedent of the TTAB</b></p> |
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Hearing Date: August 11, 2021

Mailed: October 8, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*General Motors LLC*

*v.*

*Bolt Ride, Inc.*

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Opposition No. 91240088

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Mary A. Hyde, Anessa Owen Kramera and Ka'Nea K. Brooks  
of Honigman LLP for General Motors LLC.

Charles B. Welch, Jr. and Tyler A. Cosby of Farris Bobango PLC,  
and Ann I. Dennen of Dennen IP Law, LLC for Bolt Ride, Inc.

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Before Zervas, Adlin and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Bolt Ride, Inc. ("Applicant") seeks registration on the Principal Register of the standard character mark BOLT for "downloadable computer software for transportation services" in International Class 9.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87439619 was filed on May 7, 2017, based upon Applicant's allegation of its first use of the mark anywhere at least as early as June 30, 2014 and its first use in commerce at least as early as March 1, 2016 under Trademark Act Section 1(a), 15 U.S.C. §1051(a).

In its Notice of Opposition,<sup>2</sup> General Motors LLC (“Opposer”) opposes registration of Applicant’s BOLT mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the goods identified in the Application, so resembles Opposer’s registered marks:

| <b>Mark</b> | <b>Reg. No.</b> | <b>Goods</b>  |
|-------------|-----------------|---|
| BOLT        | 5171924         | Motor land vehicles, namely, automobiles in the nature of cars <sup>3</sup> |
| BOLT EV     | 5182238         | Motor land vehicles, namely, electric automobiles <sup>4</sup>              |

as to be likely to cause confusion, mistake or deception. Opposer further alleges that Applicant committed fraud in the filing of its Application with the U.S. Patent and Trademark Office (“USPTO”).

Applicant admits that Opposer’s BOLT and BOLT EV marks and registrations are valid, subsisting, and are prima facie evidence of Opposer’s ownership of the marks for the goods recited therein.<sup>5</sup> Applicant also admits Opposer’s priority of rights in the BOLT mark regarding the goods set forth in the registration for that mark.<sup>6</sup> Applicant additionally admits that its BOLT mark is identical to Opposer’s BOLT mark and closely similar to Opposer’s BOLT EV mark.<sup>7</sup> Applicant further

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<sup>2</sup> 1 TTABVUE. Citations to the pleadings, the evidence of record and the parties’ briefs refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page and paragraph references, if applicable.

<sup>3</sup> Registration No. 5171924 was issued on March 28, 2017.

<sup>4</sup> Registration No. 5182238 was issued on April 11, 2017; “EV” disclaimed.

<sup>5</sup> Notice of Opposition, 1 TTABVUE 4-5, ¶¶ 12-13; Answer, 4 TTABVUE 3, ¶¶ 12-13.

<sup>6</sup> Notice of Opposition, 1 TTABVUE 5, ¶ 19; Answer, 4 TTABVUE 3, ¶ 19.

<sup>7</sup> Notice of Opposition, 1 TTABVUE 6, ¶ 20; Answer, 4 TTABVUE 3, ¶ 20.

admits the filing date and particulars of its BOLT trademark application.<sup>8</sup> Applicant otherwise denies the salient allegations of the Notice of Opposition.<sup>9</sup>

The case is fully briefed. The parties appeared for an oral hearing before this panel.

Opposer bears the burden of proving its Trademark Act Section 2(d) claim by a preponderance of the evidence. *Metro Traffic Control, Inc. v. Shadow Network Inc.*, 104 F.3d 336, 41 USPQ2d 1369, 1372 (Fed. Cir. 1997); *West Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994). Having considered the evidentiary record, the parties' arguments and applicable authorities, as explained below, we find that Opposer has carried this burden, and sustain the Opposition. We need not, and do not, reach Opposer's fraud claim. *See Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1478 (TTAB 2017) (Board has "discretion to decide only those claims necessary to enter judgment and dispose of the case") (quoting *Multisorb Tech., Inc. v. Pactive Corp.*, 109 USPQ2d 1170, 1171-72 (TTAB 2013)).

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<sup>8</sup> Notice of Opposition, 1 TTABVUE 5, ¶¶ 14-17; Answer, 4 TTABVUE 3, ¶¶ 14-17.

<sup>9</sup> Answer, 4 TTABVUE.

## I. The Evidentiary Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved BOLT application. In addition, the parties introduced the following evidence:<sup>10</sup>

### A. Opposer's Evidence

- Opposer's First Notice of Reliance ("Opp NOR 1") on Applicant's Initial Disclosures, Applicant's Discovery Responses, and the transcripts with exhibits from the Discovery Depositions of Applicant's principals: Applicant's President, J. Frank ("Frank") Warmath, Sr. ("Frank Warmath Depo. Tr."); Applicant's Treasurer, J. Frank ("John") Warmath Jr. ("John Warmath Depo. Tr."); and Applicant's Creative Director, William Baker Grant Warmath ("Baker Warmath Depo. Tr.") [public and redacted, 21 TTABVUE; confidential, 22 TTABVUE].<sup>11</sup>

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<sup>10</sup> In this Opposition, both parties filed under Notices of Reliance the transcripts and exhibits from discovery depositions taken during the discovery period. Both parties filed the deposition transcripts in condensed format, multiple pages per sheet. Deposition transcripts filed in such a format are difficult to read, and require double citations to the TTABVUE docket and to the condensed transcript pages. Trademark Rule 2.123(g), 37 C.F.R. § 2.123(g), expressly provides that "deposition transcript[s] [filed with the Board] must be submitted in full-sized format (one page per sheet), not condensed (multiple pages per sheet)." However the parties had their discovery deposition transcripts formatted for discovery purposes, once offered into evidence at trial they became trial evidence that had to comply with the appropriate formatting rules for the filing of deposition transcripts. The parties' counsel are admonished that their future filings of deposition transcripts with the Board must meet the requirements of the Trademark Rules of Practice.

Additionally, both parties at points submitted evidence that was not in procedural compliance with the Trademark Rules pertaining to Notices of Reliance. *See* Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.02 (2021). Neither party objected to the procedural infirmities of its adversary's Notice of Reliance evidence. Where objections were not timely asserted we deem the parties to have stipulated to the submission of the evidence outside of the rules. *See Barclays Capital Inc. v. Tiger Lily Ventures Ltd.*, 124 USPQ2d 1160, 1163 (TTAB 2017) ("Objections to testimony or to a notice of reliance grounded in asserted procedural defects are waived unless raised promptly, when there is an opportunity to cure.").

<sup>11</sup> Opposer filed the entirety of Applicant's Disclosures, Interrogatory Answers, Production Responses and Admissions Responses, as well as the transcripts and exhibits from Applicant's Discovery Depositions, as confidential with no public filing in redacted format serving to shield only truly confidential information. *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014) (documents that are designated confidential do not appear in the electronic docket, TTABVUE). "Board proceedings are designed to be transparent to the

- Opposer's Second Notice of Reliance ("Opp NOR 2") on websites and online articles regarding Opposer's and competitors' electric vehicles and ride-sharing/ride-hailing services [23 TTABVUE].
- Opposer's Third Notice of Reliance ("Opp NOR 3") on website articles published in 2017 regarding awards given to Opposer's BOLT EV vehicle; and Applicant's Facebook, Instagram and website pages [24 TTABVUE].
- Opposer's Fourth Notice of Reliance ("Opp NOR 4") on third-party U.S. trademark applications and registrations for vehicle reservation services and vehicles; and Opposer's application in Brazil to register the BOLT mark [25 TTABVUE].
- Testimony Declaration of Opposer's Lead Architect of EV Infrastructure, Alexander Keros ("Keros Decl."), with exhibits [26 TTABVUE].
- Testimony Declaration of Opposer's Senior Manager for Global Product Research, Dennis Socha ("Socha Decl."), with exhibits [public and redacted, 27 TTABVUE; confidential, 28 TTABVUE].
- Testimony Declaration of Opposer's Lead Counsel for Trademarks and Design Patents, Timothy Gorbatoff ("Gorbatoff Decl."), with exhibits [public and redacted, 29 TTABVUE; confidential, 30 TTABVUE].
- Testimony Declaration of Opposer's Marketing and Advertising Manager, Kata Beslic, with exhibits ("Beslic Decl.") [public and redacted, 31 TTABVUE; confidential, 32 TTABVUE].

## **B. Applicant's Evidence**

- Applicant's Notice of Reliance ("App NOR") on the transcripts from the Discovery Depositions of Opposer's witnesses, Ms. Belsic ("Belsic Depo. Tr.") and Messrs. Keros and Socha ("Keros Depo. Tr." and "Socha Depo. Tr.") [39 TTABVUE], with exhibits filed separately [43 TTABVUE].

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public and the contents of proceeding files publicly available. The improper designation of materials as confidential thwarts that intention. Moreover, it is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decision." *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1461 (TTAB 2014). In any event, Applicant filed the same material (except its Admissions Responses) in public, non-confidential format, without redaction. App Updated NOR, 43 TTABVUE 70-198, 816-30, 1172-1350. Therefore, in rendering our decision, we will not be bound in this opinion by Opposer designating the materials submitted with its First Notice of Reliance as "confidential." We will treat only testimony and evidence that is clearly of a private nature or commercially sensitive as confidential.

- Applicant's Updated Notice of Reliance ("App Updated NOR") [43 TTABVUE] on:<sup>12</sup>
  - Transcripts from the Discovery Depositions of Applicant's principals: Frank Warmath, John Warmath, and Baker Warmath, with exhibits.
  - Applicant's Interrogatory Answers and Responses to Requests for Production.
  - Select exhibits from Opposer's Testimony Declarations (Gorbatoff Exhs. A, L and V; Socha Exh. Q, P and R; and Belsic Exh. S).
  - Trademark Electronic Search System ("TESS") Search Results for the term "BOLT" (TESS registration abstracts provided).
  - TESS Search Results for the term "SILVERADO" (only TESS list of marks provided, no registrations or abstracts).
  - Consent Agreement between Opposer and Yamaha Hatsudoki K. K.<sup>13</sup>
  - Websites and other online articles regarding the company Bolt Mobility Corporation.
  - Online article regarding TESLA car sales.
  - Third-party applications and registrations for marks including or comprising the term "BOLT".

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<sup>12</sup> Applicant inappropriately duplicated many of Opposer's evidentiary filings in the Updated Notice of Reliance including discovery deposition transcripts and exhibits thereto. The Trademark Rules do not permit a party to file the discovery deposition transcripts and exhibits of its own witnesses, or its own discovery responses. Trademark Rules 2.120(k), 37 C.F.R. § 2.120(k)(1). However, once Opposer made these items of record, as well as the exhibits annexed to Opposer's Testimony Declarations, Applicant was entitled to rely on them without re-filing this evidence with the Board and unnecessarily burdening the Board with additional, duplicative materials to review. Trademark Rules 2.120(k)(7), 2.122(a); 37 C.F.R. §§ 120(k)(7), 2.122(a). Also, in its Updated Notice of Reliance (43 TTABVUE), Applicant duplicated many, but not all, of the exhibits in its original Notice of Reliance (39 TTABVUE). Where duplicated, we cite only to the exhibits filed with Applicant's Updated Notice of Reliance.

<sup>13</sup> Opposer did not timely move to strike this consent agreement, or object to it as having been introduced improperly. Opposer only objected – in its Reply Brief – that the agreement is irrelevant. 55 TTABVUE 21-22. We overrule Opposer's relevance objection, because the objection is untimely and the consent agreement is relevant to the scope of protection for Opposer's marks. Since Opposer did not assert a timely procedural objection to this document, such an objection is waived and Opposer is deemed to have stipulated to the submission of this evidence – even though the consent agreement was not properly filed through Applicant's Notice of Reliance. See *Barclays Capital*, 124 USPQ2d at 1163 (TTAB 2017).

- Examples of third-party uses from the Internet of marks including or comprising the term “BOLT”.
- Applicant’s Answer to Notice of Opposition.
- Applicant’s ride report, Santa Fe and Albuquerque, NM, January-February 2017.<sup>14</sup>
- TESS Search Results for the term “VOLT” (only TESS list of marks provided, no registration abstracts).
- TESS Search Results for the term “CAMARO” (only TESS list of marks provided, no registration abstracts).
- Testimony Declaration of John Warmath, with exhibits.

### **C. Opposer’s Rebuttal Evidence**

- Opposer’s Fifth Notice of Reliance (“Opp NOR 5”) on:
  - Registration copies, TESS registration abstracts and (if applicable) assignment records for Opposer’s marks: BOLT, BOLT EV, BOLT EUV, VOLT, and Opposer’s pending Application to register the VOLT mark.
  - Numerous TESS abstracts of abandoned applications filed by Bolt Mobility Corporation for marks including the term “BOLT”.
  - TESS abstracts of pending applications filed by Bolt Mobility Corporation for the marks “BOLTMOBILITY” and “BOLT”.

## **II. The Parties**

Opposer, General Motors, LLC, asserts, and Applicant concedes, that Opposer is one of the world’s largest automotive manufacturers.<sup>15</sup> Opposer uses the registered marks BOLT and BOLT EV in connection with an all-electric vehicle offering an

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<sup>14</sup> Normally, Bolt Ride’s Ride report would not be an appropriate submission through a Notice of Reliance. See Trademark Rule 2.122(g). Opposer did not assert a timely procedural objection to this document, so the objection is waived and Opposer is deemed to have stipulated to the submission of this evidence. See *Barclays Capital*, 124 USPQ2d at 1163 (TTAB 2017). In any event, Opposer made this document of record with the transcript from one of Applicant’s discovery depositions. See John Warmath Depo. Tr. 22 TTABVUE 163-64, 364, Tr. pp. 109-11, Exh. 19.

<sup>15</sup> Notice of Opposition, 1 TTABVUE 3, ¶ 4; Answer, 4 TTABVUE 2, ¶ 4. See also Applicant’s Brief, 54 TTABVUE 10.

EPA-estimated 238 miles of range on a single charge.<sup>16</sup> Opposer, through its Chevrolet Division, began sales of the BOLT EV vehicle in December 2016.<sup>17</sup>

Applicant, Bolt Ride, Inc., was founded in June 2014 by Frank Warmath and his two sons, John and Baker.<sup>18</sup> Frank is the company's President (who functions mainly as a consultant to the business), John is the Treasurer (who handles all the company's day-to-operations), and Baker is the Creative Director (who handles logo, website and advertising design).<sup>19</sup> The company has no other employees.<sup>20</sup>

Applicant provides a downloadable mobile software application (an "app") that connects users to a curated selection of carbon-free transportation options. To date, those transportation options have been provided by electric vehicles,<sup>21</sup> including TESLA models S and X, and Chevrolet BOLT EVs.<sup>22</sup> Baker Warmath conceived of

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<sup>16</sup> Gorbatoff Decl., 29 TTABVUE 5-6, ¶¶ 3, 9. Actually, Opposer does not market or sell a vehicle named BOLT. The car Opposer sells is called the BOLT EV. Beslic Depo. Tr., App NOR, 39 TTABVUE 52-53, Tr. pp. 13-14. However, consumers and others in the marketplace on social media websites and in online newspapers and publications simply refer to the vehicle as BOLT. Beslic Depo. Tr., App NOR, 39 TTABVUE 61, Tr. pp. 47-4.

<sup>17</sup> Beslic Depo. Tr., App NOR, 39 TTABVUE 55-56, Tr. pp. 25-27.

<sup>18</sup> John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 141, 143, Tr. pp. 18, 26-27; Frank Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 71, Tr. pp. 13-14; Baker Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 371-72, Tr. pp. 17-18.

<sup>19</sup> Frank Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 70, 73, 78, Tr. pp. 10, 18, 39-41; John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 141, Tr. pp. 19-20; John Warmath Decl., App Updated NOR, 43 TTABVUE 1164, ¶ 2; Baker Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 372, Tr. p. 18

<sup>20</sup> Baker Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 371-72, Tr. pp. 17-18; Applicant's Facebook pages, Opp NOR 4, 24 TTABVUE 37-38.

<sup>21</sup> John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 143-44, 153-54, Tr. pp. 27-31, 69-72; Frank Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 73, Tr. p. 20; Baker Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 372-73, Tr. pp. 20-22.

<sup>22</sup> John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 153, Tr. pp. 67-68.



the BOLT name for Applicant's software-as-a-service, which was approved by John Warmath on behalf of the company.<sup>23</sup>

Most of the drivers who have provided rides to customers connected through Applicant's mobile app do not own their own electric vehicles. A separate company called Zero TN, LLC ("Zero") primarily owns the electric vehicles used by drivers connected through Applicant's BOLT app. Applicant's three founders started Zero to own a small fleet of vehicles to rent to drivers because the supply of electric vehicles in the marketplace was too low.<sup>24</sup>

The first, web-based, version of Applicant's BOLT app was developed in late 2014 to early 2015; a second, stand-alone mobile app version in July 2015; and an updated mobile app version in early 2016, which Applicant currently uses. The first, web-based, version of the BOLT app was used over one weekend in Nashville, TN, in connection with the Vanderbilt University 2015 graduation, and at no other time. The mobile app version of the BOLT app was first made commercially available during the summer of 2015,<sup>25</sup> and was available for download on the Apple App Store and Google Play Store as of the date that Applicant's BOLT trademark application was filed on May 7, 2017.<sup>26</sup>

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<sup>23</sup> John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 156-57, Tr. pp. 81-82; Baker Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 377, Tr. p. 41; Frank Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 73, Tr. p. 20.

<sup>24</sup> John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 148-49, Tr. pp. 49-51; Frank Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 76-77, Tr. pp. 33-36.

<sup>25</sup> John Warmath Depo. Tr., Opp NOR 1, 22 TTABVUE 151-54, Tr. pp. 59-64, 69-72.

<sup>26</sup> *Id.* at 160, Tr. pp. 95-97.

### III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a threshold issue that must be proven by the plaintiff in every inter partes case. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C., § 1063, a plaintiff must demonstrate “an interest falling within the zone of interests protected by the statute and ... proximate causation.” *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*4 (Fed. Cir. 2020), *cert. denied*, \_\_\_ U.S. \_\_\_ (2021), (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)).<sup>27</sup> Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020), *cert. denied*, \_\_\_ U.S. \_\_\_ (2021); *see also Empresa Cubana*, 111 USPQ2d at 1062.

There is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277 at \*4. Thus, “a party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] ....

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<sup>27</sup> Our decisions have previously analyzed the requirements of Trademark Act Sections 13 and 14, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Trademark Act Sections 13 and 14 remain applicable.

Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *See Corcamore*, 2020 USPQ2d 11277 at \*7.

As noted, Applicant concedes Opposer is the owner of valid federal trademark registrations for the BOLT and BOLT EV marks in connection with vehicles and electric vehicles, respectively.<sup>28</sup> Opposer made of record copies, as well as TESS database abstracts, of these registrations.<sup>29</sup> Because Opposer's registrations are of record, and Applicant concedes Opposer's ownership and the validity thereof, Opposer has established its entitlement to bring its Trademark Act Section 2(d) claim in this proceeding. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

#### **IV. Priority**

Because Opposer relies on its asserted BOLT and BOLT EV trademark registrations that have been made of record, and Applicant has not challenged these registrations by way of any cancellation counterclaim(s), Opposer's priority is not at issue with respect to its registered marks for the goods identified in its registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110

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<sup>28</sup> Notice of Opposition, 1 TTABVUE 3-4, ¶¶ 12-13; Answer, 4 TTABVUE 3, ¶¶ 12-13.

<sup>29</sup> Opp NOR 5, 42 TTABVUE 6-15.

(CCPA 1974). Applicant also concedes Opposer's priority at least with respect to Opposer's BOLT mark and registration.<sup>30</sup>

## V. Likelihood of Confusion

Trademark Act Section 2(d), 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Our analysis is based on all of the probative evidence of record. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (noting the elements, or factors, to be considered). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source

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<sup>30</sup> Notice of Opposition, 1 TTABVUE 4, ¶ 19; Answer, 4 TTABVUE 3, ¶ 19. *See also* Applicant's Brief, 54 TTABVUE 8-9.

and to protect trademark owners from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and the other *DuPont* factors for which there is evidence and argument, are discussed below.

#### **A. The Parties’ Marks**

In our evaluation of the similarity or dissimilarity of the parties’ marks, we first consider the strength of Opposer’s marks and then compare the respective marks in their entirety.

##### **1. Strength of Opposer’s Marks**

Before we turn to the similarity of the marks, we consider the strength of Opposer’s mark under the fifth and sixth *DuPont* factors, *DuPont*, 177 USPQ at 567, as that will affect the scope of protection to which they are entitled. In determining the strength of a mark, we consider its conceptual strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength

(distinctiveness) and its marketplace strength (secondary meaning).”). The commercial strength of the mark also is affected by the number and nature of third-party use of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

As Opposer’s BOLT and BOLT EV marks are registered on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), they are presumed to be inherently distinctive and at the very least suggestive. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). The Chevrolet BOLT EV is a fully electric vehicle, operated with an electric motor and driven by a battery. Opposer thus chose the BOLT name for its vehicle as the best among several under consideration, most of which (including BOLT) were associated with electricity.<sup>31</sup> The acronym “EV” stands for “electric vehicle,”<sup>32</sup> and thus has been disclaimed apart from the BOLT EV mark as a whole in Opposer’s Trademark Registration No. 5182238.

Applicant disputes the inherent strength distinctiveness of Opposer’s BOLT and BOLT EV marks by making of record 604 pages of third-party applications (many abandoned) and registrations (several cancelled) comprising or including the term “Bolt.”<sup>33</sup> Evidence that a mark, or an element of a mark, was adopted or at some time appropriated by many different registrants may undermine the common element’s conceptual or inherent strength as an indicator of a single source. *Jack Wolfskin*

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<sup>31</sup> Socha Depo Tr., 39 TTABVUE 29, Tr. pp. 26-28.

<sup>32</sup> *Id.* at 36, Tr. p. 55.

<sup>33</sup> Applicant’s Brief, 54 TTABVUE 17, 20; App Updated NOR, 43 TTABVUE 308-605, 831-1138.

*Austrang Fur Draussen GmbH & Co. KGAA v. New Millenium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (the extent of third-party use or registrations may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason)); *see also Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011) (third-party registrations indicate term CLASSIC has suggestive meaning as applied to tobacco products); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-695, (CCPA 1976) (finding third-party registrations may be used “in the same way that dictionaries are used.”).

However, many of Applicant’s third-party references recite goods and services far removed from vehicles, car parts and accessories, or automobile-related services. These references are not probative. *See In re I.AM.Symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

Regarding the third-party applications and cancelled or expired registrations Applicant submitted, applications, whether pending or abandoned, are evidence only

of the fact that they have been filed, *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009), *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1403 n.4 (TTAB 2010) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002)), and have no other probative value, *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). A cancelled or expired registration has no probative value other than to show that it once issued. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“a cancelled registration does not provide constructive notice of anything.”).




Stripped of the irrelevant third-party application and registration evidence, we find the following references probative, to one extent or another, of conceptual strength:<sup>34</sup>

| <b>Mark</b>                          | <b>Reg. No.</b> | <b>Goods/Services</b>  | <b>Owner</b>              |
|--------------------------------------|-----------------|--|---------------------------|
| AIR DESIGN SUPER BOLT                | 6159077         | Truck and SUV parts and accessories, Cl. 12  | Air Design S.A. de C.V.   |
| BOLT                                 | 5795846         | Scooter sharing services, Cl. 39   | Bolt Mobility Corporation |
| HALO BOLT                            | 5337781         | Portable car battery chargers; portable car battery jumping kits, Cl. 9                          | Zagg Inc.                 |
| BOLT ON TECHNOLOGY                   | 5053537         | Computer software development for use by automotive repair, parts and service businesses, Cl. 42 | Bolt On Technology, LLC   |
| BOLT CUSTOM TRUCKS AND MANUFACTURING | 4748817         | Truck parts, namely, a premium-outfitted truck cab, Cl. 12                                       | Gracie Industries LLC     |

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<sup>34</sup> App Updated NOR, 43 TTABVUE 316, 372, 570, 870-71, 875-876, 898, 970, 1008-09, 1023, 1026, 1111, 1135.



| <b>Mark</b>   | <b>Reg. No.</b> | <b>Goods/Services</b>  | <b>Owner</b>                  |
|---|-----------------|--|-------------------------------|
|    | 4748816         | Truck parts, namely, a premium-outfitted truck cab, Cl. 12   | Gracie Industries LLC         |
| BOLT CUSTOM TRUCKS AND MANUFACTURING  | 4721070         | Service and repair in connection with truck sleeper cabs, Cl. 37   | Gracie Industries LLC         |
|    | 4721069         | Service and repair in connection with truck sleeper cabs, Cl. 37   | Gracie Industries LLC         |
| BOLT  | 4429759         | Motorcycles and structural parts therefor, excluding wheels, Cl. 12  | Yamaha Hatsudoki K. K.        |
| BLS POLY BOLT-ON TUFFPADS HIGHTOP   | 3969495         | Track pads for tracked vehicles, Cl. 12  | BLS Enterprises, Inc.         |
| BOLT  | 3233301         | Freight transportation by car, van, and truck, Cl. 39  | Bolt Express, LLC             |
| CO-BOLT   | 2899319         | Vehicles and apparatus for locomotion by land ..., namely, ... automobiles and structural parts therefor, Cl. 12 | Carrosserie Hess AG           |
| BOLT EXPRESS  | 2593090         | Freight transportation services by car, van, and truck, Cl. 39   | Bolt Express, LLC             |
|  | 3887710         | Security products for use with automotive keys and key codes, Cl. 6  | Strattec Security Corporation |
| ULTIMATE BOLT-ON PERFORMANCE!   | 4172052         | Internal combustion vehicle engine parts, Cl. 7; Land vehicle transmission parts, Cl. 12                         | Autosales, Incorporated       |
| BLS POLY BOLT-ON  | 2947550         | Track pads for tracked vehicles, Cl. 12  | BLS Enterprises, Inc.         |
| LITENING BOLT PERFORMANCE PRODUCTS  | 1868178         | Automobile body panels; automobile chassis parts, Cl. 12   | Crites Industries             |

Considering that Opposer's goods identified in its registrations are confined to motor vehicles, we find less relevant those of the above-listed registrations that do not recite automobiles or structural parts therefor in the identification of goods. We also find less relevant those third-party registrations including the term BOLT that do not have the connotation of the definition of this term associated with electricity (e.g., BOLT ON TECHNOLOGY, BLS POLY BOLT-ON TUFPADS HIGHTOP, ULTIMATE BOLT-ON PERFORMANCE, etc.).

Dictionary definitions of the term "Bolt" include: "a lightning stroke," "a wood or metal bar or rod used to fasten a door," "the part of a lock that is shot or withdrawn by the key," "a metal rod or pin for fastening objects together that usually has a head at one end and a screw thread at the other and is secured by a nut," and "a metal cylinder that drives the cartridge into the chamber of a firearm, locks the breech, and usually contains the firing pin and extractor."<sup>35</sup> Opposer's Mr. Socha testified that Opposer chose the term "Bolt" due to its connection with electricity,<sup>36</sup> and a number of these third-party registrations submitted by Applicant make use of that definition, thereby indicating the suggestiveness of the term in connection with the goods identified in Opposer's registration. *See Top Tobacco*, 101 USPQ2d at 1173 (TTAB 2011) (third party registrations indicate term CLASSIC has suggestive meaning as

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<sup>35</sup> Dictionary definitions of "Bolt" taken from the online version of the MERRIAM-WEBSTER dictionary (<https://www.merriam-webster.com/dictionary/bolt>, last visited Oct. 6, 2021). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

<sup>36</sup> Socha Depo. Tr. 39 TTABVUE 29, Tr. pp. 27-29.

applied to tobacco products); *Tektronix*, 189 USPQ at 694-695 (third-party registrations may be used “in the same way that dictionaries are used.”).

Because one of the dictionary definitions of “Bolt” is associated with electricity, third-party registered marks exist that comprise or include the term “Bolt” which have similar relevance to Opposer’s type of goods, and the acronym “EV” stands for “electric vehicle,” we find that BOLT and BOLT EV are suggestive marks for Opposer’s goods. *Jack Wolfskin*, 116 USPQ2d at 1136.

Turning to the fifth *DuPont* factor, “a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark.” *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). Under the fifth *DuPont* factor, a finding regarding the commercial strength of a plaintiff’s mark for purposes of likelihood of confusion is not “an all-or-nothing measure.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). It “varies along a spectrum from very strong to very weak.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

Commercial, or marketplace, strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1899. Commercial strength may be measured “by the volume of sales and advertising expenditures of the goods sold under the mark ..., length of time of use of the mark;

wide-spread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the products ....” *Weider Pubs., LLC v. D & D Beauty Care Co., LLC*, 109 USPQ2d 1347, 1354 (TTAB 2014).

In support of its argument that the BOLT and BOLT EV marks are “very strong” and “well known,”<sup>37</sup> Opposer states its electric vehicles are promoted and sold in connection with these marks via digital (Internet and social media), print, out-of-home (dealerships), and radio spot means,<sup>38</sup> and have been featured in the press and received numerous awards and accolades including: 2017 MOTOR TREND Car of the Year, North American Car of the Year in 2017 at the North American International Auto Show, and one of TIME magazine’s 25 Best Inventions of 2016.<sup>39</sup> Opposer also points to its not-insubstantial (but confidential) advertising expenditures, sales numbers and income received from BOLT EV car sales since the vehicle was introduced in December 2016.<sup>40</sup> Opposer, however, did not provide market share or other degree-of-notoriety information, which would have been helpful to determine the level of marketplace strength Opposer’s marks enjoy. *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (discussing “contextual evidence of the type of advertisements and promotions ... [the trademark owner] uses to gain sales”). *Bose Corp. v. QSC*

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<sup>37</sup> Opposer’s Brief, 49 TTABVUE 35-37.

<sup>38</sup> Opposer’s Brief, 49 TTABVUE 34; Beslic Decl. (confidential version), 32 TTABVUE 5, ¶ 7; Keros Depo. Tr., 39 TTABVUE 35-36, Tr. pp. 53-55.

<sup>39</sup> Opp NOR 3, 24 TTABVUE 6-23, 30-33.

<sup>40</sup> Beslic Decl. (confidential version), 32 TTABVUE 5, 11-16, 23-30, ¶¶ 5-6, Exhs. A, B and V. All sales and advertising figures filed under seal.

*Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002) (discussing market share as one means to place advertising and sales number in context);

Applicant challenges Opposer's claim of marketplace strength with several pieces of evidence. First and foremost, Applicant provided publicly available information that Tesla's sales of its all-electric vehicles dwarfed Opposer's BOLT EV sales by comparison for the 2016-18 period that Opposer provided its sales information.<sup>41</sup>

Applicant also introduced documentation demonstrating that Opposer is not the only company selling a transportation-related product named "Bolt."<sup>42</sup> Notably, Opposer entered into a co-existence agreement with Yamaha Hatsudoki K.K., consenting to the latter's U.S. use and registration of the BOLT trademark in connection with "two-wheeled vehicles, including motorcycles, mopeds and scooters; three-wheeled vehicles including three-wheeled scooters; and their parts and fittings."<sup>43</sup> Opposer argues that the "consent agreement between Yamaha and GM ... is of little to no probative value" because it involved motorcycles, whereas Applicant's

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<sup>41</sup> App Updated NOR, 43 TTABVUE 812-15.

<sup>42</sup> Due to lack of sufficient contextual information, we give very little value to the Google search results discussed in and attached to John Warmath's Testimony Declaration regarding third-party company, service and product names including the term "Bolt." Warmath Decl., 43 TTABVUE 1164-65, 1167, 1169- 71, ¶¶ 5-8, Exhs. A and C-E. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1759 (TTAB 2013) (results from search engine introduced by testimony admissible but of limited probative value because they lack sufficient context), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). We also decline to consider the webpage material originating with the Netherlands scooter company Bolt Mobility B.V., whose product is offered for sale in Euros, *Id.* at 1164, 1168, ¶ 6, Exh. B, because Applicant did not provide sufficient evidence of exposure of this company and its product to U.S. consumers. *Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2021 n.9 (TTAB 2014) ("Articles submitted by opposer from foreign publications ... have not been considered insofar as opposer did not provide evidence of U.S. circulation").

<sup>43</sup> General Motors/Yamaha Trademark Consent Agreement, App Updated NOR, 43 TTABVUE 696-97.

product in this opposition is an “app offering transportation services in 100% electric vehicles such as GM’s BOLT vehicles.”<sup>44</sup> While there is some merit to Opposer’s argument, we find its co-existence agreement with Yamaha to be one dent in Opposer’s BOLT trademark armor.

Applicant further made of record a series of online articles and a third-party company’s website regarding the Bolt Mobility Corporation, a business reported to have been co-founded in 2018 by Olympic gold medalist Usain Bolt and whose executives include a number of former General Motors’ executives.<sup>45</sup> We consider these articles as demonstrating consumer exposure to their content, not for the truth of any assertion made therein. According to the articles, Bolt Mobility provides carbon-free electric BOLT CHARIOT, BOLT ORIGINAL and BOLT ONE scooters, bikes and mopeds for rent, in multiple urban areas where there is a dearth of public transportation options or there is significant traffic congestion. Applicant’s evidence also includes several articles discussing Bolt Mobility’s development of a two-seat electric micro-car called the BOLT NANO for short, intra-city journeys, which we also consider for consumer exposure and not for the truth of any assertion contained therein. However, the materials Applicant submitted do not indicate whether the BOLT NANO vehicle has ever been manufactured, or rented or sold to consumers, and published reports from 2020 inform consumers that Bolt Mobility has pulled out of some U.S. markets where its electric scooter rentals have been unprofitable.

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<sup>44</sup> Opposer’s Rebuttal Brief, 55 TTABVUE 21.

<sup>45</sup> App Updated NOR, 43 TTABVUE 720-811.

Applicant additionally introduced five webpages demonstrating third-party uses of “... BOLT ...” marks in the transportation sector. This evidence includes the marks HUCKBOLTS used by Duncan Bolt for bolts used in the assembly of truck cabs and trailers, and BOLT used by Gracie Industries LLC in connection with custom truck cabs and sleepers.<sup>46</sup>

Considering the evidence as a whole, we find Opposer’s BOLT and BOLT EV marks to be suggestive and hence somewhat inherently weak and of moderate commercial strength.

## **2. The Similarity or Dissimilarity of the Marks**

We now consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), the first *DuPont* factor. As noted, Applicant admits in its Answer that its BOLT mark is identical to Opposer’s BOLT mark and closely similar to Opposer’s BOLT EV mark.<sup>47</sup> In its brief, however, Applicant argues that “[w]hether or not the marks are similar is irrelevant to this proceeding” because the parties’ goods and classes of goods (for registration purposes) are different. Moreover, argues Applicant (providing no further reasoning), “[e]ven though both GM’s marks and the Applicant’s contain the word “BOLT” each have [sic] entirely different commercial impressions.”<sup>48</sup>

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<sup>46</sup> App Updated NOR, 43 TTABVUE 1139-48.

<sup>47</sup> Notice of Opposition, 1 TTABVUE 6, ¶ 20; Answer, 4 TTABVUE 3, ¶ 20.

<sup>48</sup> Applicant’s Brief, 54 TTABVUE 13-14.

We discuss below Applicant's arguments regarding the differences in the parties' respective goods. Here, we hold Applicant to the admission in its Answer, which is supported by the involved application and pleaded registrations, and we find, that Applicant's BOLT mark is identical to Opposer's BOLT mark and closely similar to Opposer's BOLT EV mark in appearance, sound, meaning and commercial impression.<sup>49</sup> Applicant does not seriously argue otherwise. This factor weighs heavily in favor of finding a likelihood of confusion.

**B. Similarity or Dissimilarity of Goods,  
Channels of Trade and Purchasers**

The second, third and fourth *DuPont* factors are “[t]he similarity or dissimilarity and nature of the goods ... described in an application or registration”; “[t]he similarity or dissimilarity of established, likely-to-continue trade channels”; and “[t]he ... buyers to whom sales are made ....” (including the nature of the transactions consummated in connection with the mark). *DuPont*, 177 USPQ 567.

Regarding the second *DuPont* factor, “the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products ... on which they are being used in order to support a holding of likelihood of confusion.” *L’Oréal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The identity or close similarity

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<sup>49</sup> While we compare Applicant's BOLT mark and Opposer's BOLT EV mark in their entirety, *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 2021 USPQ2d 35, \*2 (Fed. Cir. 2021), the presence in Opposer's BOLT EV mark of the descriptive and disclaimed term “EV” (meaning “electric vehicle”) does not meaningfully distinguish the parties' marks. See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (descriptive terms are properly given less weight); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (disclaimed matter that is descriptive of or generic for a party's goods is typically less significant or less dominant when comparing marks).



of the parties' marks therefore influences our evaluation of how close the parties' goods need to be for us to find that confusion is likely.

In making our determination regarding the relatedness of the goods, trade channels and purchasers, we must look to the goods as identified in Applicant's application and Opposer's registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.")). The goods of Registrant and Applicant need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs.*, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).

Opposer's recited goods are automobiles and electric automobiles. Applicant's identified goods are downloadable computer software for transportation services. There are no limitations regarding trade channels or target consumers, and thus we

do not read any such limitations into the identifications of goods of either party. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). Thus, regardless of the parties' actual business activities, the goods in Applicant's application and Opposer's registrations are construed to include all goods of the types identified, sold in all normal channels of trade for such goods, to all usual purchasers of them. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1825-26 (TTAB 2009).<sup>50</sup>

Opposer first argues that "the parties' goods are closely related because they both either are or center around electric vehicles. [Opposer]'s BOLT goods are electric vehicles, and Applicant's [BOLT] downloadable software purports to offer users rides in electric vehicles."<sup>51</sup> As we noted above, we must look to the goods as identified in the Application and Opposer's Registrations – not based upon the parties' actual business practices. *Stone Lion Capital Partners, v. Lion Capital*, 110 USPQ2d at 1162.

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<sup>50</sup> Applicant argues that the parties' marks and goods are distinguishable because the opposed Application and Opposer's Registrations are in different registration classes. This argument is wholly without merit. *See Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) ("[C]lassification is wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification."); *INB Nat'l Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1587 (TTAB 1992) ("[T]he system of dividing goods [and services] into classes is purely a manner of convenience[,] and ... a determination on the question of likelihood of confusion cannot be restricted by the artificial boundary created by classification."); Trademark Act Section 30, 15 U.S.C. § 1112 ("The Director may establish a classification of goods and services, for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant's or registrant's rights."); Trademark Rule 2.85(f), 37 C.F.R. 2.85(f) ("Classification schedules shall not limit or extend the applicant's rights.").

<sup>51</sup> Opposer's Brief, 49 TTABVUE 26.

Opposer's better, and more persuasive, argument is that "Applicant's [BOLT] [A]pplication does not exclude transportation in electric vehicles, so it must be interpreted as broadly as reasonable," citing *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); ("An opposition or cancellation proceeding requires consideration not only of what the applicant has already marketed or has stated the intention to market, but of all the items for which registration is sought.") (internal quotation omitted).<sup>52</sup> Thus, the "downloadable computer software for transportation services" identified in Applicant's BOLT Application is broad enough to encompass use of the software for transportation services provided by electric vehicles such as the BOLT EV.

Given the breadth in scope of Applicant's identified goods, although not determinative we find somewhat persuasive that ride hailing services<sup>53</sup> through Applicant's app have been provided only using electric vehicles,<sup>54</sup> the Chevrolet BOLT EV is one of the brands of electric vehicles promoted for use by the drivers involved with this service,<sup>55</sup> and, until Opposer complained, electric vehicles used to provide

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<sup>52</sup> *Id.* at 28.

<sup>53</sup> A "ride hailing service" involves facilitating the transportation of people from one place to another for a fee. Examples of services include Uber and Lyft. Keros Depo. Tr. 39 TTABVUE 12, Tr. p. 14. The services provided through Applicant's BOLT app are ride hailing services. Applicant's response to Admission Request No. 12, Opp NOR 1, 22 TTABVUE 18; Applicant's Initial Disclosures, 22 TTABVUE 8.


<sup>54</sup> John Warmath Depo. Tr., 22 TTABVUE 143-44, Tr. pp. 27-32; Applicant's response to Admission Request No. 16, Opp NOR 1, 22 TTABVUE 18-19.

<sup>55</sup> John Warmath Depo. Tr., 22 TTABVUE 152-53, 358-59, Tr. pp. 65-67, Depo. Exh. 16.

the ride hailing service to consumers through Applicant's app at one time had Applicant's BOLT mark emblazoned on them.<sup>56</sup>

Opposer's further evidence that the parties' goods are related comprises third-party applications and registrations made of record reciting both software for coordinating transportation services and automobiles.<sup>57</sup> Third-party use based registrations that cover goods of the type recited in both Opposer's registrations and Applicant's Application are relevant to show that the respective goods are of a type that may emanate from a single source under one mark. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (finding that third-party registrations covering both wine and water were probative of the relatedness of those beverages). However, as we noted above regarding the third-party trademark evidence Applicant made of record, pending or abandoned applications, and cancelled or expired registrations, are irrelevant to the analysis of relatedness.

Thus, stripped of the non-probative evidence, Opposer made of record the following active third-party registrations:

| Mark  | Reg. No. | Goods  | Owner                     |
|---|----------|--|---------------------------|
| INMOTION  | 5003520  | Downloadable mobile applications to match drivers with individuals for rides, Cl. 9; Motor land vehicles, Cl. 12 | Jaguar Land Rover Limited |
|  | 5539117  | Mobile application software for connecting drivers and passengers, Cl. 9; Motor land vehicles, Cl. 12            | Jaguar Land Rover Limited |

<sup>56</sup> *Id.* at 150-51, Tr. pp. 57-58; Applicant's Facebook and Instagram pages; Opp NOR 3, 24 TTABVUE 35, 37, 38, 40, 41, 47, 49, 50, 52, 53, 55, 56.

<sup>57</sup> Opposer's Brief, 49 TTABVUE 29-32; Opp NOR 4, 25 TTABVUE 29-34, 41-45.

|                     |                            |   |  |
|---------------------|----------------------------|---|--|
| <b>Mark</b><br>TOQN | <b>Reg. No.</b><br>5625164 | <b>Goods</b><br>Computer software for coordinating, scheduling, booking, and dispatching vehicles for passenger; Land vehicles, automobiles, Cl. 12 | <b>Owner</b><br>No Tie Ventures GmbH                 |
| AMBER               | 5784575                    | Electric cars, Cl. 12; Booking of transportation via a website, Cl. 39  | P33 Holding d/b/a Amber Besloten Vennootschap (B.V.) |

By itself, the quantity of this third-party registration evidence is only slightly persuasive, particularly considering that two of the four cited registrations are owned by the same entity.

Opposer's further evidence of product relatedness includes examples of Opposer's and its competitors' uses of their vehicles to provide ride-sharing, ride-hailing and online rental services. Opposer, for example, has developed and deployed downloadable software used for connecting vehicle drivers and passengers and for coordinating transportation services called MAVEN.<sup>58</sup> Opposer's BOLT vehicle and the MAVEN app were developed in tandem, such that Opposer deployed both products in furtherance of a common strategic mission.<sup>59</sup> The BOLT vehicle was

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<sup>58</sup> Keros Decl., 26 TTABVUE 5, ¶ 4; Gorbatoff Decl., 29 TTABVUE 8, ¶ 21; Beslic Decl., 31 TTABVUE 6-7, ¶¶ 14-15; Beslic Decl. (confidential version), 32 TTABVUE 17-22, Exh. S; Opp NOR 2, 23 TTABVUE 35-66, 75-84, 116-120.

<sup>59</sup> Keros Decl., 26 TTABVUE 5, ¶ 9; Beslic Decl., 31 TTABVUE 6, ¶ 13.

intended for use with the MAVEN app<sup>60</sup> so that drivers would use the BOLT EV to earn money by performing rideshare and product delivery services.<sup>61</sup>

In its Trial Brief, Opposer described its MAVEN app in the past tense.<sup>62</sup> When questioned about this during the oral hearing, Opposer's counsel represented that the MAVEN app was developed in 2016, but its use was discontinued in 2020.

Opposer also points to plans in development by its competitors – TESLA, VOLVO and NISSAN – to make their vehicles available for ride sharing or ride hailing services.<sup>63</sup> The articles Opposer made of record reflect consumer exposure to the future intentions of competitors, rather than actually-implemented services.

Applicant argues that the parties' goods are different, in that its product is software used for a ride-hailing service and that Opposer's products are vehicles. Applicant further contends that the services provided through its software are purchased through a smartphone app – not a detailed process; whereas Opposer's vehicles are purchased as a major investment – through a very detailed process that occurs in a dealer's showroom.<sup>64</sup>

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<sup>60</sup> Keros Decl., 26 TTABVUE 6, ¶ 10; Gorbatoff Decl., 29 TTABVUE 8, ¶ 22.

<sup>61</sup> Keros Decl., 26 TTABVUE 6, 16-36, 74-75, 78-127, ¶ 11, Exhs. E-F, I, K-M.

<sup>62</sup> Opposer's Brief, 49 TTABVUE 32-33: "[Opposer]'s prior ride-share or car-sharing app, 'Maven,'" "[t]he BOLT vehicle was available for rental through the Maven app", "[t]he two products also were marketed heavily together", the "strong historic association between [Opposer]'s BOLT vehicles and a GM-created app for coordinating transportation services".

<sup>63</sup> Opposer's Brief 49 TTABVUE 33; Opp NOR 2, 23 TTABVUE 67-74, 85-100, 111-115.

<sup>64</sup> Applicant's Brief, 54 TTABVUE 15-16. Actually, Applicant did not provide sufficient evidence and linking argument regarding the entirety of the ride hailing service enabled by its BOLT app. Applicant focuses on a customer's purchase at the moment he or she desires to go from point A to point B. In order to hail a car ride, the customer first must have already downloaded the BOLT app to a smartphone, signed up for the service, and inputted payment information. These are a more detailed set of transactions than Applicant discusses in its

Apart from Opposer's evidence discussed above, its additional arguments rely on: (1) the lack of restrictions in the identification of goods in Applicant's Application and Opposer's Registrations; (2) both parties promoting and offering their goods via similar trade channels – the Internet and social media; and (3) both parties' customers tending to be smart phone users.<sup>65</sup>

Overall, we find Opposer's evidence and arguments as to the relationships between the parties' trade channels and purchasers to be more persuasive than those asserted by Applicant. Opposer and its competitors either have offered or plan to offer their electric vehicles in connection with ride hailing apps and related services. Applicant itself, as its app has been promoted, advertises that its ride hailing services would be provided either in BOLT EV vehicles or (until Opposer complained) cars emblazoned with the BOLT name on them.

In the end we cannot ignore, and we find influential in evaluating the second *DuPont* factor (the similarity of the goods), that Applicant's BOLT mark is identical or closely similar to Opposer's BOLT and BOLT EV marks, respectively. *L'Oréal*, 102 USPQ2d at 1439. Moreover, if we focus (as Applicant has done in its brief) on the non-detailed nature of how the purchase of a ride hailing service is consummated through Applicant's BOLT app (after the customer has downloaded the app and set up the service), we find it likely, in evaluating the fourth *DuPont* factor, that

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brief. When these additional transactions are taken into account, the entire process for hailing a ride via Applicant's BOLT app approaches nearly as many different steps as are needed for Opposer's customers to purchase a BOLT vehicle.

<sup>65</sup> Opposer's Brief, 49 TTABVue 34.

Applicant's customers would be confused as to the relationship between Opposer's BOLT and BOLT EV vehicles and the ride hailing service enabled by Applicant's BOLT app. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1472 (TTAB 2016) (“[C]ommon sense facts that are not subject to reasonable dispute” may be sufficient to decide customer care.); *Floralife, Inc. v. Floraline Int’l Inc.*, 225 USPQ 683, 686 (TTAB 1984) (“[O]rder[ing Applicant’s goods] while rushing through airport terminals and the like ... [is] a marketing situation which is fraught with the possibility of mistake or confusion of marks.”).

Based on the evidence of record, we find that the nature of the parties’ goods and trade channels, and the overlapping potential customers, weigh in favor of finding a likelihood of confusion.

### **C. Actual Confusion**

Applicant argues that “[f]or more than five years, the parties’ products have co-existed in the marketplace bearing their respective marks. During that extended time period, there has been no evidence of any confusion between the marks.”<sup>66</sup> These arguments call upon us to evaluate the seventh *DuPont* factor, the “nature and extent of any actual confusion,” and the eighth *DuPont* factor, the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567.

In its decision on remand from the Federal Circuit in *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160 (Fed. Cir. 2019), the Board held that the eighth *DuPont*

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<sup>66</sup> Applicant’s Brief, 54 TTABVUE 10.



factor “requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.” *In re Guild Mortg.*, 2020 USPQ2d 10279, \*15 (TTAB 2020). The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *see also Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (probative value of the absence of actual confusion depends on there being a significant opportunity for actual confusion to occur).

Applicant’s BOLT app was first made available for the Vanderbilt graduation in 2015. One could use the BOLT app to go from campus to any one of the five major boroughs in Nashville. The purpose of the first iteration of the BOLT app was to service the Vanderbilt graduation. It was not used for any other purpose.<sup>67</sup>

From the founding of Applicant’s business to the filing of its trademark application in May 2017, its company was in “operational ramp-up” mode, which entailed “launching several iterations” of the BOLT app, “publishing the app[] on the app store,” and getting customers to order “rides through the BOLT app[].”<sup>68</sup> Other than Nashville, TN, the only other evidence of Applicant arranging for ride hailing services through the BOLT app was in Santa Fe and Albuquerque, NM from June 2016

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<sup>67</sup> John Warmath Depo. Tr., 22 TTABVUE 151, Tr. pp. 59-61.

<sup>68</sup> *Id.*, 22 TTABVUE 160, Tr. pp. 96-97.

through February 2017,<sup>69</sup> after which Applicant stopped offering services in those cities because the drivers were dismissed and the cars were moved to Nashville.<sup>70</sup> Thereafter, Applicant claims to have offered ride hailing services through the BOLT app, once again in Nashville, for off-and-on periods since mid- to late 2017.<sup>71</sup> The best that Applicant's President, Frank Warmath, could say of the continuity of Applicant's services from 2015 to 2018 is that were "sporadic."<sup>72</sup>

Applicant's argument that there has been no actual confusion between the parties' marks and goods, is therefore not persuasive. The evidence shows limited and sporadic use by Applicant of its BOLT mark; hence, there has been little opportunity for confusion to occur. Therefore, we cannot gauge whether or the extent to which there has been an opportunity for confusion to occur if it was likely to occur. *See Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989) ("The absence of any showing of actual confusion is of very little, if any, probative value here because ... no evidence was presented as to the extent of ETF's use of the VITTORIO RICCI mark on the merchandise in question in prior years ...."); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). This factor is thus neutral.

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<sup>69</sup> *Id.*, 22 TTABVUE 163-64, 361-64, Tr. pp. 107-11; Depo. Exhs. 18-19.

<sup>70</sup> Frank Warmath Depo. Tr., 22 TTABVUE 76, Tr. pp. 31-33.

<sup>71</sup> John Warmath Depo. Tr., 22 TTABVUE 147, Tr. pp. 42-44.

<sup>72</sup> Frank Warmath Depo. Tr., 22 TTABVUE 150, 56-57.

## **VI. Conclusion regarding Likelihood of Confusion**

From the evidence of record, Opposer's BOLT and BOLT EV marks are suggestive, and hence somewhat inherently weak, and are of moderate commercial strength. As Applicant concedes, the parties' marks are identical or closely similar. There is sufficient evidence that the parties' goods are related, and the trade channels and potential customers overlap in part. Due to the limited and sporadic nature of Applicant's use of its BOLT mark, we find the absence of actual confusion to be a neutral factor in our analysis. Balancing the *DuPont* factors for which there is evidence and argument, we conclude that confusion between the parties' marks and goods is likely.

### **Decision:**

The opposition to registration of Applicant's BOLT mark is sustained on grounds of likelihood of confusion under Trademark Act Section 2(d). Because we have sustained the opposition on the ground of likelihood of confusion, we need not and do not address Opposer's claim of fraud.